

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA

v.

CRIM. NO. 97-245

ANGEL CHEVERE GONZALEZ

Defendant

DEFENDANT'S MOTION FOR A NEW TRIAL FOR NEWLY  
DISCOVERED EVIDENCE AND, OR, IN THE ALTERNATIVE  
FOR A WRIT OF ERROR -CORAM NOBIS

RECEIVED  
U.S. DISTRICT COURT  
SAN JUAN, P.R.  
PM 10  
3/31/05

Now comes the Defendant, Angel Chevere Gonzalez, through himself, who moves the Court to grant defendant a new trial based on newly discovered evidence, pursuant to Rule 33, Federal Rules of Criminal Procedure, as well as, defendant's Sixth and Fourteenth Amendments to the United States Constitution.

In support of this Motion, Angel C. Gonzalez, states that a jury convicted him on one count of conspiracy to possess with intent to distribute 250-kilograms of cocaine, 21 U.S.C.A. § 846.

Mr. Gonzalez seeks a new trial alleging the following issues in his motion pursuant to Rule 33:

1. Ineffective assistance of trial and appellate counsels;
2. judicial errors;
3. newly discovered evidence demonstrating defendant's factual, actual or legal legal innocence; and
4. prosecutorial misconduct;
5. judicial bias.

In addition, the Defendant relies upon the attached memorandum of law and points of authorities.

Respectfully Submitted

*Angel Chevere Gonzalez*

Page Two

DEFENDANT'S MEMORANDUM OF LAW AND POINTS OF AUTHORITIES

INTRODUCTION:

Defendant Chevere-Gonzalez (hereinafter Defendant or Chevere) and nine other codefendants were charged with conspiracy to possess with intent to distribute more than 1,000 kilograms of cocaine, more than 5-kilograms of heroin and, more than 5,000 pounds of marijuana.

On February 5, 1998, a superceding indictment was filed adding four new defendants and additional overt acts. The defendant's trial commenced in 1999, and subsequently concluded with a conviction on March 31, 2000. Defendant was thereupon sentenced to 45-years imprisonment. On April 10, 2000, defendant appealed his sentence and trial irregularities. However, in February 2003, the First Circuit Court of Appeals affirmed defendant's conviction. See United States v. Nelson, 319 F.2d 12 (1st Cir. 2003).

**STATEMENT OF THE FACTS**

Angel C. Gonzalez and nine others were charged on October 30, 1997 in a single count indictment with conspiracy to possess with intent to distribute more than 1,000 kilograms of cocaine, more than 5-kilos of heroin and more than 5,000 pounds of marijuana.

This case represents the culmination of wiretap authorizations by the Honorable Jose A. Fuste, U.S. District Court Judge, to record cellular phone conversations of codefendant, Raul Rivera, by the Government through cooperating source, Jorge H. Miller. Following the expiration of the 30-day wiretaps, several extensions were granted

Page Three

on July 25, 1997 and September 10, 1997.

In July 1998, defendants moved to jointly suppress all wiretap evidence. Initially, the court granted the defendants motion for a Franks hearing, but then denied the motion without a hearing, November 6, 1998.

The most purporting evidence against the defendant came from a self-confessed criminal and government informant, Luis T. Orozco. (Tr. 591, 595). Mr. Orozco testified to being present during a drug transaction in which the defendant stood in as an armed guard to protect the shipment in July 1997. Despite Orozco's testimony of the defendant's involvement, Orozco's testimony was rived by the testimony of nineteen FBI and DEA Agents on the scene, in closer proximity than Orozco (who was close to 1,000 feet away sitting in a truck), but the agents never once admitted to having seen the defendant at all. . . nor any drug transactions for that matter. (Tr. 644, 812). (Sentence Tr. 11). This fact is in total contradiction and refutation with Orozco's testimony that is, that defendant Gonzalez was a part of this arcane drug conspiracy.

Moreover, Orozco also testified that Chevere was also involved in a 120-kilogram deal and that the drugs were counted at Chevere's mother's home in Catano. (Tr. 645). During cross examination, however, Orozco admitted that he had never been in Chevere's mother's home and that he was not present when the 120-kilograms of cocaine were actually counted. (Tr. 772).

Notwithstanding the jury's findings of guilt [a finding not based on drug quantity and type], the trial court found by preponderance of

Page Four

evidence - defendant's guilt - and, sentenced defendant to 540 months imprisonment.

On appeal, the court appointed Attorney Kenneth M. Diesenhof, Esq., who filed an Anders brief (386 U.S. 738), alleging that their were non-frivolous issues and thereupon, urged affirmance of defendant's direct appeal. . . in March 2001. Subsequently, new counsel, Raymond Rivera, was appointed. Counsel advanced three points: (1) that Title III wiretaps should have been suppressed; (2) a special verdict sheet should have been given and, the jury instructed on the unanimity requirement findings on drug type and amounts, and (3) resentencing was warranted under Apprendi v. New Jersey, 120 S.Gt. 2348 (2000), for violation on the second point. Defendant's brief was submitted April 2002. United States v. Gozalez, No. CR-00-1628.

Defendant's direct appeal was affirmed in all respects February 7, 2003. United States v. Nelson, 319 F.3d 12 (2003).

#### NEWLY DISCOVERED EVIDENCE

##### A. ACTUAL OR FACTUAL INNOCENCE CLAIMS.

Defendant presents this motion based on his actual or factual innocence under Schlup v. Delo, 115 S.Ct. 851 (1995). The Supreme Court's only specific decision on this issue came in the course of stating the holdings of Schlup, 513 U.S. 298 (1995), the seminal decision governing miscarriage of justice exception. In assessing the adequacy of defendant's showing, therefore, the district court is not bound by the rules of admissibility that would govern a trial. See also Souter v. Jones, 6th Cir., No. 03-1528, 1/18/05, 76 Cr. L. 308.

## Page Five

Defendant Chevere would proffer that the affidavits of Tomasa C. Gonzalez, Edwin Marrero and Raul Rivera, attest to, and go straight to the core of his actual or factual innocence claim. (These affidavits are expected to be filed soon thereafter or, will accompany this motion). Moreover, the affidavit of Tomasa C. Gonzalez eloquently summarizes, and particularizes the extent of the Government's illegal conduct or guise to stage a crime implicating defendant. Ms Gonzalez overheard a conversation between the two main prosecuting attorneys while she (Ms Gonzalez) was in the lady's room, at the U.S. District Court for the District of Puerto Rico, during the trial of her brother, the defendant. The Assistant U.S. Attorneys lauded themselves for setting up the defendant...knowing they had no evidence whatsoever against him...but only affiliations.

Additionally, the two other affidavits from Edwin and Raul clearly show that defendant was not at the scene of the drug shipments in July 1997, as alleged by cooperating witness, Orozco. Marrero and Rivera's averments, in their affidavits, show juxtaposing relationship with the testimony of the DEA and FBI surveillance teams personnel --who stated "they never saw defendant at the scene, July 19, 1997." . . . nor any drug transctions happening. . . for that matter.

Because of this misconduct [prosecutorial to frame an innocent defendant] on the part of Government officials, defendant was prevented from presenting this 'newly discovered evidence' until this juncture. Claims of actual innocence--to be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory-scientific evidence,

## Page Six

trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial. Schlup, supra. Even if defendant's new evidence was not linked to the constitutional infirmities he raises, Schlup does not require that a prisoner's new evidence have any such connection to his constitutional claims a prerequisite for applying the miscarriage of justice exception. See United States v. Roman, 938 F. Supp. 288, 292 (E.D. Pa. 1996)(the new evidence of actual innocence need not be directly related to the substantive claims the defendant is presenting because the claims themselves need not demonstrate that he is innocent)(emphasis added)(citation omitted).

A reading of Schlup itself demonstrates that the Supreme Court did not intend to require a link between the evidence of actual innocence and the prisoner's constitutional claims. The Court explained the purpose of the actual innocence requirement:

To ensure that the fundamental miscarriage of justice exception would remain "rare" and would only be applied in the "extraordinary cases", while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.

Schlup, 513 U.S. at 321. The Court stated that "tying the exception to a prisoner's innocence reflects the "concern about the injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system."'" Id at 325. Thus, the miscarriage of justice exception is driven by the belief that fundamental notions of justice do not comport with the idea of procedurally barring an innocent man from raising his constitutional claim.

Page Seven

Defendant's motion presents both substantive and constitutional claims of actual or factual innocence, corroborated by affidavits, coupled with constitutional claims for ineffective assistance of counsel and, compendius judicial errors, *inter alia*, which warrants the granting of a new trial.

#### ARGUMENT

##### B. COURT HAS THE POWER TO GRANT THIS MOTION

A motion for a new trial in criminal cases, considered under Rule 33, F.R. Cr. Pro., provides: (a) Defendant Motion. Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires.

The only ground for a new trial expressly set forth in Rule 33 is 'newly discovered evidence', certain other fundamental errors, such as the ineffectiveness of counsel, may justify the grant of a new trial, United States v. Russell, 221 F.3d 615, 619 (4th Cir. 2000), United States v. Smith, 62 F.3d 641, 650-51 (4th Cir. 1995)(ineffective assistance of counsel); trial irregularities, such as judicial error; prosecutorial misconduct, see United States v. Scotti, 47 F.3d 1237, 1246 (2d Cir. 1995)(erroneous juror instruction); United States v. Dixon, 658 F.2d 181, 193 (3d Cir. 1981)(prosecutorial misconduct) and where the jury's verdict is against the evidence. Moreover, a claim of ineffective assistance of counsel may be brought as a motion for a new trial or other grounds under Rule 33. United States v. Woods, 812 F.2d 1483 (4th Cir. 1987). Such motion may be filed regardless of whether the bases for the claim are evidence in the trial record. see e.g. Taglia, 922 F.2d at 417; United States v. Logan, 861 F.2d 859, 863 (5th Cir.

## Page Eight

1988). Additionally, other types of egregious errors which have been deemed sufficient to meet a new trial include the failure of the prosecution to disclose pertinent information. United States v. Udechukwu, 11 F.3d 1101, 1106 (1st Cir. 1993), the failure to give the jury special interrogatories [resulting in an ambiguous verdict], United States v. Garcia, 907 F.2d 380, 381 (2d Cir. 1990) cert den., 502 U.S. 1030 (1992) and, the erroneous admission of a defendant's prior convictions. United States v. pagan, 721 F.2d 24, 30 - 31 (2d Cir. 1983).

Further, a district court's power to grant a motion for a new trial is broad. In considering a motion under Rule 33, the court is not bound to assess credibility and draw all inferences in favor of the prosecution, but should evaluate the evidence independently. United States v. Arrington, 757 F.2d 1484, 1485 (4th Cir., 1985).

**(i) Coram Nobis' alternative jurisdiction**

This court likewise has supplemental jurisdiction under the All Writs Act [28 U.S.C.A. § 1651(a)] in the form of a writ of error - coram nobis...as an alternative jurisdiction if none is available for the relief sought herein.

28 U.S.C.A. § 1651(a) authorizes this court to hear defendant's motion under common-law principles...when there is no other statute applicable. Section 1651(a) states: (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdiction and agreeable to the usages and principles of law. The All Writs Act is a residual source of authority to issue writs are not otherwise covered by statute. Where a statute specifically addresses the particular issue

## Page Nine

at hand, it is the authority, and not the All Writs Act, that is controlling. See carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting Pennsylvania Bureau of Corrections v. United States Marshals Service, 474 U.S. 34, 43 (1985)).

## ARGUMENT

## A. TRIAL COUNSEL'S DEFICIENT PERFORMANCES, PRETRIAL, TRIAL AND SENTENCING WAS INEFFECTIVE ASSISTANCE OF COUNSEL

During the pretrial stages, Attorney De Juan refused to conduct any pretrial investigations which to obtain, or seek, any potential witnesses on behalf of the defendant. That during the times of the overt acts in the indictment, defendant was under house arrest in 1997, and could not have participated in any of the acts spawning the conspiracy, October 30, 1997. A potential witness to the house arrest, Social Worker Elpidio Hueltas, and former boss, Raul Rivera Sr., if investigated and interviewed, would have confirmed defendant's whereabouts on many of the dates and times mentioned in the indictment. Had attorney De Juan conducted a minimal investigation, ferreted these facts, counsel may well have been in able to present a plausible defense of 'actual innocence', alibi, or innocent presence...even during the times of the conspiracy where Chevere was alleged to have made personal appearances. See Brown v. Myers, 137 F.3d 1154 (9th Cir. 1998)(ineffective assistance for failing to investigate available testimony supporting petitioner's alibi); U.S. v. kaufman, 109 F.3d 186 (3d Cir. 1997)(ineffective for not investigating law and facts relevant to plausible defense); Williams v. Ward, 110 F.3d 1508 (10th Cir. 1997)(same); Wiggins v. Smith, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003).

If a thorough pretrial investigation had been conducted, and witnesses interviewed, counsel would have been in a better posture to argue a defense of actual innocence. . . consistent with, and also supported by the testi-

Page Ten

mony of the nineteen (19) federal agents who testified that they never saw Chevere throughout their investigation of the members in the alleged conspiracy. See for example, Murray v. Carrier, 477 U.S. 384-86 (1986)(a single serious error or failure can amount to ineffective assistance of counsel).

Counsel de Juan's performance fell below the standards recognized in Strickland, in that, investigation is critical to making a well informed decision. Wiggins, 123 S.Ct. 2527 (2003). Because no investigation was ever conducted, Chevere was denied the right to compulsory process of witnesses in his favor [5th Amendment violation] and, denied the Sixth Amendment right to present a defense of actual innocence.

Assuming, for purposes of the Strickland analysis, that the foregoing failures were potentially prejudicial to petitioner Chevere, it cannot be said from the present record that counsel's performance did not fall below the Strickland objective standard....This is because Chevere has pleaded that the failure's in defending him were based on failures to investigate the law and facts material to him in pretrial, trial sentencing, and direct appeal, however innocently unintentional, but a complete abandonment of counsel's duty to advocate Chevere's case and cause. See U.S. v. Soto, 132 F.3d 56, 58 (D.C. Cir. 1997); Wiggins, 123 S.Ct. 2527 (2003); Mays v. Gibson, 2000 U.S. App LEXIS 8858 (10th Cir. 2000)(citing Williams v. Taylor, 120 S.Ct. 1495, 1512 - 16 (2000); Jackson v. Calderon, 2000 U.S. App. LEXIS 9040 (9th Cir. May 8, 2000)(same).

B. PRETRIAL CONFLICT OF INTEREST

Petitioner Chevere contends that Attorney de Juan created a potential, per se or actual conflict of interest between them by attempting to extort and solicit funds from Chevere. From the beginning of de Juan's representation of Chevere, all counsel de Juan discussed with the petitioner was de Juan's desire to have petitioner become a government informer and witness against his co-conspirators and, to make a large retainer payment to de Juan for better representation of Chevere.

That attorney de Juan, in order to illustrate this conflict of interest, deliberately chose not to interview "any" potential witnesses for Chevere [Raul Rivera Sr. and Social Worker Elpidio Hueltas] until Chevere made payment of the \$25,000 , although counsel was being paid by the Court under the Federal Criminal Justice Act, 18 U.S.C.A. § 3006A.

That counsel never once discussed with Chevere his efforts to pursue any plea negotiations with the government for a reduced sentence, see Anders v. California, 386 U.S. 738 (1967), nor contrived any efforts for a plea all the way up unto the trial date -- because of the high conviction rates by the Government, people often plead guilty. . . despite their innocence. . . to avoid a lengthy prison sentence. De Juan's refusal and failure to try to secure a plea negotiation was done in order to facilitate Chevere receiving a 45-year sentence, knowing that the risk of a trial would subject Chevere to career offender sentencing.

Because of this potential or actual conflict of interest, Chevere demanded that Mr. de Juan remove himself from the case, in many instances, but, however, because of the language barrier [Chevere spoke no English], de Juan often would speak to the Court in English and misinformed the court

Page Twelve

of Chevere's dissatisfaction with counsel's representation. See Mickens v. Taylor, 535 U.S. 162, 166 (2002); Wood v. Georgia, 450 U.S. 261, 271 (1981).

Additionally, counsel de Juan failed to file any pretrial motions to suppress evidence, use of wiretap information, voice exemplars from telephone conversations. . . based on improper affidavits to Magistrate Judges's. . . relying exclusively, if not solely, on coconspirators counsels' to lead the way for de Jaun. See In re Applications for Interception of Electronic Communications, 2 F. Supp.2d 177, 178 (D. Mass. 1998)(quoting U.S v. Solemme, 978 F. Supp. 343, 348 (D. Mass 1997)) (emphasis in original).

Moreover, despite petitioner's extensive criminal record and background, de Juan never prepared Chevere to testify in his own behalf after de Juan had already precociously decided that he wouldn't be calling any witnesses for Chevere [leaving Chevere to believe that the Government's case was very weak], in an effort to defeat all and any hopes of Chevere winning his case. See Anders v. California, 386 U.S. 738 (1967); Strickland v. Washington, 466 U.S. 668 (1984); U.S. ex rel Casey v. Wolff, 727 F.2d 656 (7th Cir. 1984)(defense counsel's out-of-hand rejection of potential witnesses and decision not to call witness because prosecutions case was so weak falls below the minimum standards of professional competence.)

A defendant claiming ineffective assistance of counsel must establish the existence of an 'actual conflict' of interest and demonstrate that the conflict of interest adversely affected his lawyer's performance at trial. Sullivan, 446 U.S. at 350; Reyes-Vejerano v. U.S., 276

Page Thirteen

F.3d 94, 97 (1st Cir. 2002)( a defendant that raises no objection at trial must demonstrate in his 2255 petition that an actual conflict of interest adversely affected the adequacy of his representation).

The First Circuit Court of Appeals elaborated on Sullivan by requiring the defendant to prove two components; (1) that counsel could have pursued a plausible alternative defense strategy, and (2) such an alternative tactic was inherently in conflict with or not pursued due to the attorney's other loyalties or interest. Reves-Vejerano, 276 F.3d at 97; Familia - Consoro v. U.S., 160 F.3d 761, 764 (1st Cir. 1998).

In this case, de Juan should have pursued an alternative defense strategy by permitting (and preparing) Chevere to testify about not having any knowledge of the conspiracy, that the conversation(s) he had recorded involved work at a friend's home. . . regarding placing glass blocks in his friend's home. . . not kilograms of cocaine [Federico Naranjo Rosa]. Additionally, Chevere wanted to testify at his trial, despite his criminal past, but de Juan coerced and advised him not to take the stand. . . because of the case being weak. Chevere's testimony could have provided the jury with testimony refuting the government's evidence. Moreover, this alternative defense strategy would have significantly weakened the government's argument under the Pinkerton theory (conspiracy analysis) that it was reasonably foreseeable for Chevere to have been responsible for 250 - 1,000 kilograms of cocaine. . . or, to have knowledge of the coconspirators intent and future plans.

De Juan did not have Chevere testify because his testimony would have been inherently in conflict with de Juan's loyalty to money and, the Government's (as a former employee of the U.S. Attorneys Office)

Page Fourteen

and inherently in conflict with de Juan's desire to not to provide Chevere with a plausible defense. See Brien v. U.S., 695 F.2d 10, 15 (1st Cir. 1982). De Juan's decision to keep Chevere from testifying resulted from his conflict of interest in maintaining his loyalty to the U.S. Attorneys Office, for retainer payments of twenty-five thousand dollars from Chevere, coupled with the areas mentioned above, thus deprived Chevere of effective assistance of counsel.

Even if the Court concludes that Chevere's ineffective assistance of counsel resulting from an actual conflict of interest fails, the court must grant Chevere's claim of ineffective assistance of counsel because of the existence of a 'potential conflict of interest' claim. To prevail under a potential conflict of interest claim, a defendant "must" establish both (1) that counsel's conduct fell below an objective standard of reasonableness and (2) that but for this deficient conduct, the result of the trial would have been different." Strickland 466 U.S. at 668 (1984). De Juan's loyalties and interests to money and status with the government fell below an objective standards of reasonableness and, but for de Juan's conflict of interest, the results of Chevere's trial would have been different. Id.

Mr. de Juan's close ties and association's with the Government, represents a conflict of interest measurably below what constitutes reasonable representation. See American Bar Association Model Rules of Professional Conduct. Rule 1.7, Conflict of Interest; Strickland, 466 U.S. at 688 - 89 , ABA 1.7 Comment 1. De Juan's close ties to the Government, prevented him from providing Chevere sound representation free of the pressures and feelings of loyalty to the Government, needless to say, money. De Juan's past employment and affiliation with the Government [U.S. Attorneys Office] is alone sufficient to demonstrate a

conflict of interest . . . preventing de Juan 's representation of Chevere.

These conflicts of interest in de Juan's relationship with Chevere affected de Juan's reasonable professional judgment and contributed to his decision not to have Chevere testify at his trial (although he had no witnesses for the defense). See e.g. Griffin v. California, 380 U.S. 609, 611-12 (1965)(right to testify); Hardy, 37 F.3d 753, 757 (1st Cir. 1994). Petitioner Chevere wanted to testify to explain that he didn't know about any conspiracy. De Juan unreasonable conduct, because of his conflict of interest and remaining loyalty to the government, besides greed, prejudiced Chevere and, denied Chevere effective representation.

#### C. FAILURE TO REMAIN ABREAST OF CASE LAW

It cannot be denied that Orozco was a government agent, financed and supported by the Government, assigned the task of infiltrating drug organizations in both Colombia and Puerto Rico. Petitioner Chevere through other members were alleged to have conspired with Orozco... thus, giving birth to the instant conspiracy, had no affiliation with this organization. Had counsel de Juan been effective, counsel would have known that petitioner Chevere could not be a coconspirator with a government agent, and therefore, de juan should have argued the facts and law. See example, U.S. v. Lewis, 53 F.3d 29 (4th Cir. 1995); U.S.v. Brink, 39 F.3d 419 (3rd Cir. 1994); Escobar de Bright, 742 f.2d 1196, 1200 (9th Cir. 1984); Pennell , 737 F.2d 521, 536 (6th Cir. 1984), cert denied, 469 U.S. 1158 (1985); Trombello, 666 F.2d 485, 490 n.e (11th Cir.) cert denied, 456 U.S. 994; Barnes 604 F.2d 121, 161 (2nd Cir. 1979). cert denied, 446 U.S. 907 (1980);

## Page Sixteen

Sullivan v. U.S., 1995 U.S. App. LEXIS 16590 (7th Cir. 1995)(ineffective assistance of counsel of counsel failed to challenge conviction for conspiracy with government agent.) Compare Murray v. Carrier, 477 U.S. 384 - 86 (a single serious error or failure...ineffective assistance of counsel); U.S. v. Kauffman, 109 F.3d 186 (3rd Cir. 1997) (ineffective for failing to investigate law and facts relevant to plausible defense); Williamson v. Ward, 110 F.3d 1508 (10th Cir. 1997)(same); Headley, 923 F.2d 1079, 1083 - 84 (2nd Cir. 1991)(same); Wiggins v. Smith, 123 S. Ct. 2527 (2003)(counsel's failure to investigate mitigating evidence could not be strategic "because the investigation supporting their choice was unreasonable.").

#### D. SENTENCING INEFFECTIVENESS

Mr. Chevere contends that counsel de Juan provided him ineffective assistance during the sentencing hearing phase by failing to present arguments (based on awareness of counsel's applicable law) against the Court assessing a two-point increase for Possession fo a Firearm in connection with a drug offense that could not be deemed directly connected to the alleged drug trafficking activities.

That the only individual capable of placing a weapon in the hand of mr. Chevere was Orozco, . . . who was very confused about what he actually saw in Chevere's hand(s) from a considerable distant away. Moreover, Orozco's testimony was shattered and discredited by federal agents testimony, and who witnessed the events, but never testified that they saw "any weapon in the hands of petitioner Chevere," or at any drug transaction, for that matter.

Petitioner Chevere's PSR Report makes reference to the two-point

## Page Seventeen

increase and application under U.S. sentencing Guidelines 2D1.1(b)(1). Nevertheless, the mere existence of a 'firearm' is insufficient to support a Section 2D1.1 enhancement as a matter of law. The Government has the burden of proving under 2D1.1(b)(1) of showing by a preponderance of evidence that a temporal and spatial relation existed between the weapon, the drug trafficking activity, and petitioner. U.S. v. Vasquez, 161 F.3d 909 (5th Cir. 1998).

The Probation Officer erroneously relied on scant information to support a basis for the two-point level increase which fails to support that temporal and spatial relation existed between the weapon, the drug trafficking and petitioner Chevere.

The Court, therefore, erred in relying on insufficient information in the PSR to support the upward adjustments (which should have been objected to) and, in its perception of a firearm involvement in this case. Glover, 148 L.Ed.2d 604 (2000) citing U.S. v. Phillips, 210 F.3d 345 (5th Cir. 2000)(finding prejudice under the Sentencing Guidelines when error by counsel led to an increased sentence.)

#### E. FAILURE TO REQUEST AN EXPERT WITNESS TO MUSTER A DEFENSE

Petitioner Chevere claims prejudice and deficient performance of de Juan for his refusal to seek an order from the Court for an expert witness with expertise in the field of 'voice exemplars, audio or voice transmission, Rules 901(A), 901 (B)(5) and 801(D)(2)(e) Federal Rules of Evidence, to muster a defense [plausible] of actual innocence or factual innocence, as well as, to elucidate for the jury the drug cultural language (slang) used in the streets involving drug trafficking. Moreover, such an expert was necessary so that the

jury would know that what he was speaking of over the telephone was not drug transactions, but legitimate business dealings. Cf. Bell v. Arn, 536 F.2d 123 (6th Cir. 1976); Smallwood v. Gibson, 191 F.3d 1257, 1276-77 (10th Cir. 1999); Kumbo Tire Comp. v. Carmichael, 526 U.S. 137 (1999).

#### F. FAILURE TO FILE PRETRIAL SUPPRESSION MOTIONS

Consistent with defendant's contentions of ineffectiveness of counsel, counsel's deficient and unreasonable performances are demonstrated by trial counsel, De Juan's, failure to file a pretrial suppression motion...suppressing the evidence seized at # 2B14, Villa Aurora, in Catano, Puerto, Rico consisting of: Ledgers, telephone books, photographs, directories, business card's of Raul Rivera, personal items, inter alia. Counsel was so countmanding during the pretrial stages by failing to file a suppression motion based on unlawful seizure of property being the product of an unlawful search and seizure, because defendant was not the proprietor of the property nor lease holder, and, therefore, he could not give his consent to searching the premises to FBI Agent Montalvo, without the express consent and permission of owner. . . on November 20, 1997. (Tr. 818-832). See Brinegar v. U.S. 375 U.S. 493 (1958); Horton v California, 496 U.S. 128, 137 n. 7 (1980)"no amount of probable cause can justify a warrantless search absent exigent circumstances); People v. Winpigler, 8 P.3d 439 (Colo. 1999)(warrantless searches is presumed to violate the constitution provisions for bidding unreasonable searches and seizures especially, where there is a warrantless intrusion into a house); U.S. v. Basinki, 7th Cir. No. 99-3933, 9/15/00, 67 Cr. L. 784 (same); katz v. U.S., 389 U.S. 347, 357 (1967); Flippo, 120 S.Ct. 7 (1999); Illinois v. Rodriquez, 497 U.S. 177 (1980); Welsh v. Wisconsin, 466 U.S. 470 (1984); U.S. v. matlock, 415 U.S. 764 (1974).

Defendant was prejudiced by counsel's lack of prescience because the illegally obtained evidence against him was used against petitioner. . .

## Page Nineteen

as a nexus to tie Chevere to a purported conspiracy. . . . albeit, Chevere claimed no prior knowledge or affiliation other than being an employee at fast Transportation, a business of one of the alleged co-conspirators. Had counsel filed such a motion during the pretrial stages, the results of the proceedings would have been different and, this illegally obtained evidence would have been discarded and possible undermined the Government's case in chief. See Kimmelman v. Morrison, 477 US 365 (1986). Criminal Rule 12, F.R. Crim. Pro.

G. Failure To Object To Improper Foundation By Government

Chevere contends that trial counsel was so counterman that De Juan failed to object to the government's failure to lay a proper foundation to Luis Torres Orosco's testimony as a lay person and cooperating witness, as well as, Orosco being considered a *de facto* expert witness with respect to 'drug coded messages' and idiomatic expression used by drug dealer which to connect Chevere with the instant conspiracy. See e.g. US v. Garcia, 2nd Cir., No. 01-1068 5/17/02, 71 Cr. L. 270 (2002) government failed to set out a sufficient foundation for cooperating witness's lay opinion that defendant knew that the witness was speaking in code. See federal Rule of Evidence 701(a), 404 (b). Transcripts dated September 10, 1999, pp. 672 - 675, 678 - 81.

H. Failure To Object To Trial Proceedings Out of The Presence Of The Jury.

Records of the trial indelibly reveal counsel's deficient trial performance and failure to adhere to court rules where counsel failed to object to the continuous taking of testimony from government witnesses out of the jury's presence. Transcripts September 10, 1999,

pp. 654, lines 12 - 15, 667. In a criminal prosecution, a defendant has a Sixth Amendment right to a jury trial on all the facts and evidence, including the taking of testimony. Chevere was deprived of such a right during a critical stage of the proceedings as a result of De Juan's failure and lack of sagacity to coerce the Court to await the return of the jury to hear "all the evidence" before deciding the petitioner's guilt or innocence.' See Cronic, 446 US 684 (1974).

#### I. No Former Attempts To Plea bargain For A Lenient Sentence and Plea Prior To Trial

In this case, the record illuminously discloses that somehow no plea offer's or plea bargaining attempts were sought, and none were obtained prior to trial. The Court eloquently highlighted this point on September 13, 1999, p. 760, "that plea agreements were offered to the other co-conspirators", but, however, not to Chevere. The reasons being is because trial counsel de Juan never sought to engage the Government to consider an offer for his client. Plea bargaining negotiations generally focus of (1) the offense or offense to which a plea will be entered and what charges will be dismissed, (2) factual bases to be proffered by the government and agreed to by defense; government's position on bond status between the plea and sentence, (3) government's position concerning sentencing enhancement provision, (4) government's position at sentencing and, (5) sentencing guidelines applications. US v. Rodriguez, 929 f.2d 747, 752 (1st Cir. 1991)(per curiam)(failed to inform petitioner of government's plea offer).

Counsel's failure resulted in a new superceding indictment with additional overt acts because counsel never negotiated any plea bargain nor approached defendant with a plea offer as his co-conspirators.

## Page Twenty-One

See e.g. Bordenkircher v. Hayes, 434 US 357, 363 - 65 (1978) where court found nothing improper in the prosecutor's threat to indict the defendant on additional charges if the defendant did not accept the government's offer. US v. Goodwin, 457 US 368 (1982). It may have been in the best interest of defendant to plead guilty to a lesser charge to avoid the risk of conviction of more serious charges, even if the defendant is in fact innocent or, for whatever reason, cannot admit his guilt under an Alford plea. North Carolina v. Alford, 400 US 25 (1970).

The failure to involve plea bargaining in the defense strategy falls short of the constitutionally required assistance to be provided to a defendant in a criminal case. Boria v. Keene, 99 F.3d 492 (2nd Cir. 1996). See also US v. Gonzalez-Vasquez, 219 F.3d 37 (1st Cir. 2000). The fact that counsel did not appreciate the import of the government's intention to introduce other crimes evidence that would connote Chevere's posit involvement in threats and predilection of obstructing justice, as well as, protracting him as a dangerous offender, furthers arguments that Chevere was victimized by ineffective assistance of a constitutional magnitude. Boria, at 497 (had trial counsel taken the time to learn of certain ruinous statements petitioner had made the efficacy of a plea bargain would have been more clearly recognized).

Furthermore, the failure to attempt 'any' plea negotiations placed Chever in a posture where he was subjected to, and sentenced as, a 'career offender' to forty-five (45) years in prison, based exclusively on De Juan's muse that "the government's case was weak," and the case was a 'cinch' to win.

Had counsel taken the times and initiative to learn of the ruinous telephone conversation, introduced into evidence against his client, the illegally obtained items from his girlfriend's house which purported to connect him to the conspiracy, the probability of persuading Chevere to accept a plea or negotiate a deal would have matured from a reasonable probability - to a very strong likelihood. See **ABA Model Code of Professional Responsibility**, Ethical Consideration 7 - 7 (1992): A defense lawyer in a criminal case has the duty to advise his client fully whether to a particular plea to a charge appears to be desirable. Anthony G. Amsterdam, In Trial Manual 5 for the Defense of Criminal Cases. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty, or not guilty, against the client's will. [citation omitted]. But counsel may and must give the client the benefit if counsel's professional advice on the crucial decision. § 201 at 339. Quoting Boria, at 497. Compare and see US v. Perez, 2nd Cir., No. 02-1105, 4/25/03; US v. Jeter, 11th Cir., No. 02-15326, 73 Cr. L. 181, 5/14/03, defendant's who qualify as a career offender are not eligible for a downward departure to offense level for minor role in the offense.

#### J. Failure To Request A Special Jury Verdict Form

Throughout the course of the trial, several agents and cooperating witnesses testified to multiple conspiracies and drug types and quantities. Prior to deliberation, counsel failed to request a 'special jury verdict form' for the venirepersons to consider the many drug type, and quantities petitioner may have been solely responsible for. Had counsel predictively provided the Court with a special verdict form

instead of a 'general verdict form, there is a strong likelihood and reasonable probability that petitioner could have been convicted under the default drug statute, 21 U.S.C.A. § 841(b)(1)(C), assigning the lesser of drug types and quantities for marijuana. US v. Bailey 270 F.3d 83, 88 (1st Cir. 2001); Richardson, 526 US 813, 817 (1999). Strickland, 466 U.S. 668 (1984). See Transcripts, September 7, 1999, pp. 345; September 10, 1999, p. 638, lines 14 - 16.

#### K. Failure To Properly Argue Drug Quantity Attributed To Petitioner

Petitioner contends that counsel failed to properly argue, or present an effective argument with respect to drug quantity involvement. Based on testimony from cooperating witness who had everything to lose, Mr. Orosco, testified that at one point, "he saw 120-kilos of cocaine counted and placed in a suitcase to take to Chevere's mother's house." Transcripts, September 13, 1999, p. 772, lines 6 - 21; Tr. September 10, 1999. p. 642, lines 9 - 13. Orosco and Chevere, allegedly received 250 kilos in July 1997, September 10, 1999 Transcripts, p. 643, but, however, Orosco took 200 kilos of the 250 kilos for himself to ship to New York, macho (Raul Rivera) took fifty (50) and gave Chevere five (5) kilos from the alleged 50-kilos. September 19, 1999, p. 646.

Because drug quantity was lucidly an issue, counsel was ill-equipped in arguing attributability of 5-kilos of cocaine to Chevere... based on copperating witness Orosco's testimony. See Nichols v. US, 75 F.3d 1137 (7th Cir. 1996)(trial counsel's failure to object or argue the amount of drugs attributed to defendant based on calculation of the sentencing Guidelines, amounted to ineffective assistance of counsel where only witness' testimony gave wide range of amounts

## Page Twenty-Four

and the court failed to make any findings of credibility of said witness' testimony).

Attributing more drugs than responsible for must be raised at sentencing. See US v. Shattuck, 961 F.2d 1012, 1015 (1st Cir. 1992); US v. Haggert, 980 F.2d 8, 11 (1st Cir. 1992) ("We have discretion to review waived guideline claims in horrendous cases where a gross miscarriage of justice would occur.")

Counsel's failure to present amenable caselaw in support of this claim resulted in petitioner Chevere being held responsible for the distribution of at least 1,000 kilograms of cocaine, 5-kilos of heroin and 5,000 pounds of marijuana. Counsel could have mustered an agreement that the government erred in attribution of the above drug quantities based on the government's failure to show defendant had the capability to transport such a large amount of drugs. U.S.S.G. § 2D1.1, cmt.n 12 if, based on research and diligence, counsel could have also established that petitioner did not intend to provide, or wasn't reasonably capable of providing, the agreed upon quantities. US v. Colon-Solis, 2004 WL 35467, No. 01-1773 (1st Cir. 2004); Goodine, 326 F.3d 26, 27 (1st Cir. 2003).

L. Failure To Argue Burden Shifting Tactics Of The Government And Mental Deliberation Of the Venirepersons

Records indelibly demonstrate the government's tactical decisions to undermine justice and bereft petitioner a fair trial. On September 10, 1999, at page 663, Attorney De Juan raised a logical objection to the venire persons reading Title III wiretap interception transcripts prior to the jury having heard the audible tapes. Moreover, the transcripts precociously revealed a short description of the date(s)

of the calls, individuals names and other alleged participants, for example. Each page of the transcripts identified the participants as each spoke. September 13, 1999, pp. 764 - 766. That this precocious and preliminary revelation and proffered conversations was done and presented to the jury as a tactical decision by the Government to undermine justice and rive petitioner's hopes of a fair trial. . . shifting the burden of proof from the government to the defendant.

Additionally, because a contemporaneous objection was lodged, the failure of counsel De Juan to request an instruction allowed the jury to reach a predisposition of petitioner guilt or complicity in the conspiracy, as well as, a vogue mental act of deliberation before having heard all the evidence well before deliberation. Nevertheless, the entrenched government tactics subject petitioner to self-incrimination which further deprived him of a fair trial, because petitioner --without the assistance of an voice exemplar expert--was unable to take the sting out of what the venirepersons had read, and then heard. Cf. Hoffman v. US., 341 US 479, 486 (1951); Marchetti, 390 US at 53.

Furthermore, such a calculable manuever proved highly egregious because petitioner presented no witnesses in his behalf, no testimony on his behalf to lessen the impact of the jurors predisposition. To be sure, the presumption of injury can sometimes be rebutted. But on the facts of this case, the errors loom particularly large and, hence, the likelihood of harm is correspondingly difficult to rebut. For one thing, there's some reasons to believe that defense counsel's timely intervention might have been productive. For another thing, human experience teaches that people frequently give

Page Twenty-Six

special credence to the written word. Compare e.g. Job (Holy Bible) 19:23 ("Oh that my words were now written."). Quoting US v. Parent, 954 F.2d 23 (1st Cir. 1992).

M. Failure To Seek Funding For Voice Exemplar Expert To Determine Authenticity Of Title III Recordings Of Petitioner's Voice

The issue of voice comparisons of defendant 's was a critical factor in convicting petitioner. So critical that counsel was obligated to request funding under the Criminal Justice Act, 18 U.S.C.A. § 3006A, for a 'voice exemplar expert.'

Agent Plichta, on September 2, 1999, testified that he had previous experience in 'voice identification but, however, admitted that he had never attending school to be certified. pp. 105 -106, lines 2 - 25.

In an attempt to at least muster a defense, and discredit Plichta's testimony and credibility, it was crucial that an "expert" be subpoenaed and held to testify in an effort to create a reasonable doubt, that the voice heard on the tapes was not that of petitioner. Such a tactical and strategic choice would have created a plausible reasonable doubt. Failure to do so, therefore, amounts to ineffective assistance of counsel, ... and, more importantly, because Plichta never was "certified by the court as an expert witness."

Nevertheless, Orosco testified lengthy as to his ability to determine individual patterns or calibrations, as a de facto lay opinioned expert, but only because Orosco had an imprimatur transcript given to him prior to his testifying in court. Tr. Sept. 10, 1999, pp. 668, lines 16 - 23; 669, Lines 14 - 25 and 672. September 13, 1999 p. 766. Cf. US v. Baynes, 687 F.2d 659 (3d Cir. 1982) holding

that: Trice's attorney's acquaintance with the sound of the client's voice cannot serve as a bar to the allegation of ineffective assistance raised in this case. The Court held in Bayne's that for Trice to prevail, he need not prove that it was not his voice on the intercept recording; instead, he need only show that his trial attorneys "exploration of the voice exemplar issue might have led to a viable defense and a verdict favorable to [him]. In other words, Trice need only show that his attorney's ineffectiveness wasn't harmless, beyond a reasonable doubt. Id at 671.

Had trial counsel explored this information, through proper cross-examination, counsel could have revealed a 'labyrinthine' of lies and deceptions from Orosco, because in July 1997, Orosco didn't know that his own drug dealings and conversations were being recorded, plus, Orosco didn't know the petitioner by the names of "Junior or Chevere", but those are the exact same names that were on the recording tape conversations alleged identified by him.

#### N. Ineffective Assistance For Failing To Severe Petitioner

Throughout the trial of this case, Jorge Hernandez, Jose Diaz, Luis Torres and Hernandez Miller, all cooperating witnesses, provided plethoric information concerning 'multiple conspiracies prior to the purported case at bar. These unrelated conspiracies involved drug dealings stemming from as far back as 1992 - 1997. Had counsel De Juan filed a viable and effective pretrial motion to severe Chevere from the other co-conspirators, Chevere would not have been the recipient of: (1) those previous drug dealings and operations; (2) co-conspirators having paid Orosco \$45,000 in money orders

and cash to secure a \$625,000 debt for 250-kilograms of cocaine; (3) shooting, murders and mayhem; (4) threats and obstruction of justice to prevent cooperating witnesses from testifying; (5) crack cocaine dealings; and (6) the murder of Cruz-Quinones. Counsel De Juan's failures to challenge the above mentioned areas, seek severance, resulted in prejudice to petitioner because, it made it appear as though petitioner was a very dangerous individual despite no violence being charged in the instant crime, and, albeit, no weapons or drugs were confiscated. See Rule 12(3)(D), 14 (a), F.R. Crim. Pro. Pages 615 - 621, 692, 842 - 843.

#### O. Counsel's Deficient Trial Performances

During the two week trial of this matter, Attorney De Juan lacked any real sense of bravura and poise. . . in the presentation of petitioner's criminal case. All vestiges of an "adversarial atmosphere' were rived. The impetus behind counsel's deficient performance was a 'lack of interest in his client as a person.'

Starting from September 1, 1999 - September 24, 1999, De Juan became, and was, so disoriented that he only participated in minimum discussion and cross-exaiminations, ...lodging only perfunctory stipulations regarding several languistical specialist, Tr. Sept. 2, 1999, pp. 146 - 47; 159; p. 832; . . . stipulating to Chevere being an auto mechanic working for Fast Transporation; (2) did not attempt to drum up a challenge to the authenticity of the Title III tape recordings intercepts as counsels, Dansoh and Alvarez, pp. 212 - 221; (3) failed to request guidance from the court as

to what its standing practice was regarding "not admonishing jurors prior to break, not to discuss the cases amongst themselves, to prevent mental deliberations before hearing all evidence, pp. 172, 230, 665, 839; (4) no discovery request for cooperating witness, Hernandez Miller, and Orosco, Brady/Jencks or 302's, as requested by co-counsels Vega, Gonzalez and Aponte; (5) no cross examination of one of the government's chief witnesses, Hernandez Miller, regarding his knowledge of Chevere's standing and status in the conspiracy on direct exam, Sept. 8, 1999, pp. 466, 485; (6) in fact, there was not cursory examination of any of the F.B.I. Agents, e.g. Aponte, Rosa, Olshock, Montalvo and Grojales, and Meade, who were the two persons connected to the apprehension and arrest team of Chevere; (7) the only attempt to present any type of meaningful input with respect to Montalvo was a 'request for stipulation' that Chevere worked an auto -mechanic at Fast Transportation (8) lacked any effective cross-examination of Luis Torres Orosco regarding his observations of the cocaine shipment in July 1997, while in the truck with Macho, at a distance of over one-hundred feet; whether Orosco had binoculars; surveillance equipment, the color of the gun Chevere allegedly had, clothing, time of day, weather conditions, whether it rained, sunny or bright, etc, and more important; whether he knew that Plichta's surveillance team was also there, and why Plichta never saw Chevere if both were watching the same transactions;, Sept. 23, 1999, pp. 1424 - 27; (9) making baseless and unsupported or inapposite arguments which the Court determined was not viable, Sept. 10, 1999, p. 666, line 1 - 13;

p. 764; 1372-1416; (10) cross examine Orozco as to his lay expertise in the drug language or idomatic expressions which allowed Orozco to de-code drug messages without former education or schooling; (11) joining in on contemporaneous objections in tandem with co-counsels, without lodging any serious objections and arguments on his own; (Tr. 692, 750-53); (12) lack of preparation to oppose jurors use of written transcripts along with audible tapes of Title III intercepts to obviate unfair prejudice to defendant, (Tr. 764-776); (13) failing to present arguments that the defendant could not conspire with a 'government agent, U.S. v. Lewis, 53 F.3d 29 (4th Cir. 1995); U.S. v. brink, 39 F.3d 419 (3d Cir. 1994); U.S. v. Barboa, 777 F.2d 1420 (10th Cir. 1995)(§2255 vacated and remanded where defendant pleaded that his alleged conconspirators was a government agent); Sullivan v. U.S., 1995 U.S. App. Lexis 16590 (7th Cir. 1995)(ineffective assistance of counsel if counsel failed to challenge conviction for conspiracy with government agent); (14) to pursue a plausible entrapment defense where Orozco's testimony was overshadowed by Agent Plichta, that he never saw any drug transctions, U.S. v. Singh, 54 F.3d 1182, 1189 (4th Cir. 1995); harris v. U.S., 37 F.3d 133, 136 (4th Cir. 1999); (15) failing to object to level 38 under 2D1.1, USSG, for possession with intent to distribute at least 1,000 kilos of cocaine, 5-kilos of heroin and 5,000 pounds of marijuana, where petitioner was convicted of 250-kilos of cocaine, see Blakely v. Washington, No. 02-1632, 2004 WL 1402697, 543 U.S. \_\_\_\_ (June 24, 2004), see PSIR pp. 8-9; (16) to object to the court's preponderance of evidence findings of 1,000 kilos of cocaine when the jury find defendant guilty of 250 kilos...implying a second convictions without a jury determination in contrast to Blakely v. Washington, supra; (17) application of the Guidelines for posssession of a firearm during the commission of the instant offense under USSG 2D1.1(b)(1), adding two points, although defendant was never charged in the superceding indictment with a firearm, a Brent v. Crawford issue, No. 2:02-CR-00302 PGC (D. Utah July 7, 2004) and Blakely, supra. See Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988)(reckless disregard for his client's best interest and apparently with intent to weaken case).

Page Thirty-One

P. Judicial Improprieties And Errors

Defendant Chevere contends that the court committed egregious errors when it overruled (by implication) the jury's findings of guilt for 250-kilograms of cocaine, ...finding the defendant responsible for 1,000 kilograms of cocaine, and sentenced defendant accordingly -- based on its preponderance of evidence findings - contraindicate to Booker, 543 U.S. \_\_\_\_ (2004) and Blakely v. Washington, supra. See United Statges v. Nelson-Roriquez, 319 F.3d 12 (1st Cir. 2003).

Moreover, the enhanced sentence based on a firearm, where no such mention was couched in the superceding indictment, further affronts Booker and Blakely. The court's use of the preponderance of evidence standard was an impermissible overreach of the Supreme Court's authority above, which is now unconstitutional (due to Booker and Blakely) because, the court's decision amounted to an implied 'second conviction' without a finding of guilt by a jury in violation of defendant's Sixth Amendment rights, U.S. Constitution. Booker, moreover, impliedly overruled Dunnigan, 507 U.S. 87 (1992), where the Supreme Court made it lawful for a judge to enhance a sentence based upon judicial findings. Therefore, these issues fall square within the Teague v. Lane, 489 U.S. 288 (1980) exceptions to non-retroactivity rule.

Q. Prosecutorial Misconduct.

As alleged in Section A supra, pages 4 - 7, defendant claims that the Government committed grave misconduct by creating a subterfuge when no crime existed--in order to bring the defendant before this Federal District Court for prosecution on a federal crime of conspiracy - in an effort to unlawfully convict an 'innocent man' whose only crime was affiliation, and employment as a mechanic in Mr. Raul

Rivera's place of business, Fast Transportation. See e.g. Berger v. United States, 295 U.S. 78, 88 (1935)(the prosecutor's duty in a criminal prosecution is to seek justice). Although the prosecutor should "prosecute with earnestness and vigor", she may not use 'improper methods calculated to produce a wrongful conviction.'" See United States v. Young, 470 U.S. 1, 7 - 11 (1985); Napue v. Illinois 360 U.S. 264, 269 (1959); Mooney v. Holohan, 294 U.S. 103, 122 (1935) (per curiam). Compare Olano, 507 U.S. 725 (1993).

R. Appellate Counsel's Ineffectiveness

Under Strickland v. Washington, 466 U.S. 668 (1984), to prevail on a claim of ineffectiveness of counsel (appellate), a defendant must show that "counsel's representation fell below an objective standard of reasonableness", id at 688, and that there is a "reasonable probability that but for counsel's unprofessional errors, the results of the proceedings would have been different." id at 694.

When the claim involves appellate counsel, a defendant must show that "there is a reasonable probability that the results of the direct appeal would have been different if the argument had been made." See Chambers v. United States, 157 F.3d at 566.

In this case, defendant concerns in the above areas mentioned, arguments A-Q, appellate counsel was obligated to develop an adequate record for review from the trial proceedings, and conduct an independant investigation of his own into possible claims of ineffective assistance of trial counsel, as a 'precautionary measure, before filing any papers on appeal. Appellate counsel refused and failed to conduct an independant investigation for possible ineffective assistance of

## Page Thirty-Three

counsel claims as required by Evitss v. Lucey, 469 U.S. 387 (1985); Murray v. Carrier, 477 U.S. 378 (1986) and Kimmelman v. Morrison, 477 U.S. 365 (1986), to save trial counsel's integrity and honor, needless to say, reputation.

Appellate counsel, if properly investigated and professionally pursued, had a winnable issue(s). Had appellate counsel presented these defenses cited above, the results of defendant's appeal would have been different. Had counsel been more fluent in the law, evaluate its applications to the facts, see Correal v. U.S., 479 F.2d 944 (1st Cir. 1973), defendant would not have been faced with forty-five years imprisonment. See Anders v. California, 386 U.S. 738 (1967) and, therefore, the adversarial process was relaxed by appellate counsel's deficient performances.

Ineffective assistance of counsel on direct appeal may be shown if the records demonstrate the claim. See e.g. U.S. v. Martinez, 136 F.3d 972, 979 (4th Cir. 1999).

S. Cumulative Effects Of All Of Counsels Errors Require Reversal Of Defendant's Conviction And Sentence.

Defendant's rights to the effective assistance of counsel were violated by the cumulative effects of trial and appellate counsels errors. If the verdict is to stand, the court must be able to say with a fair degree of assurance that the errors did not skew the verdict. See Ruiz-Roche v. Pepsi Cola or PR Bottling Com, 161 F.3d 77, 83 (1st Cir. 1998).

Once this court scrutinizes the record's as a whole, and aggregates the collective effects of trial and appellate counsels' multiple

Page Thirty-Four

errors, it cannot be said with any certainty that Defendant Chevere received a fair trial. Compare United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993). As such, defendant Chevere is entitled to a new trial or vacation of his conviction and sentence.

CONCLUSION

This case is tainted by uncorrected constitutional errors during rudimentary stages and, on direct appeal...leading to defendant's conviction and sentence, and affirmance of his appeal. Because these uncorrected errors are typical of those that have undermined public confidence, fairness and the integrity of our democratic system, Olano, 507 U.S. 725 (1993); the significance of this case extends well beyond the interest of those that are personally involved in it. When a criminal defendant is compelled to pay his life for his lawyers errors, the effectiveness of our adversarial and criminal justice system - as a whole - is undermined.

WHEREFORE, for the foregoing reasons, defendant prays that this Motion be granted, and his sentence and conviction be vacated.

Dated: 3/22/05

Respectfully Submitted

Angel Chevere Gonzalez

Angel C. Gonzalez 16149-069  
USP Allenwood  
P.O. Box 3000  
White Deer, Pa. 17887-3000

CERTIFICATE OF SERVICE

I, hereby certtify that a true copy of the instant motion and attachments were mailed, postage paid, first class, this 23 day of March 2005, and properly adderssed to: us attorney District of Puerto Rico  
350 Carlos Chardón Ave, San Juan PR 00918

*Angel C. Gonzalez*  
Angel C. Gonzalez  
USP Allenwood  
P.O. Box 3000  
White Deer, Pa. 17887